(13)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1175

UNION PACIFIC RAILROAD COMPANY,
A Corporation,
Petitioner,

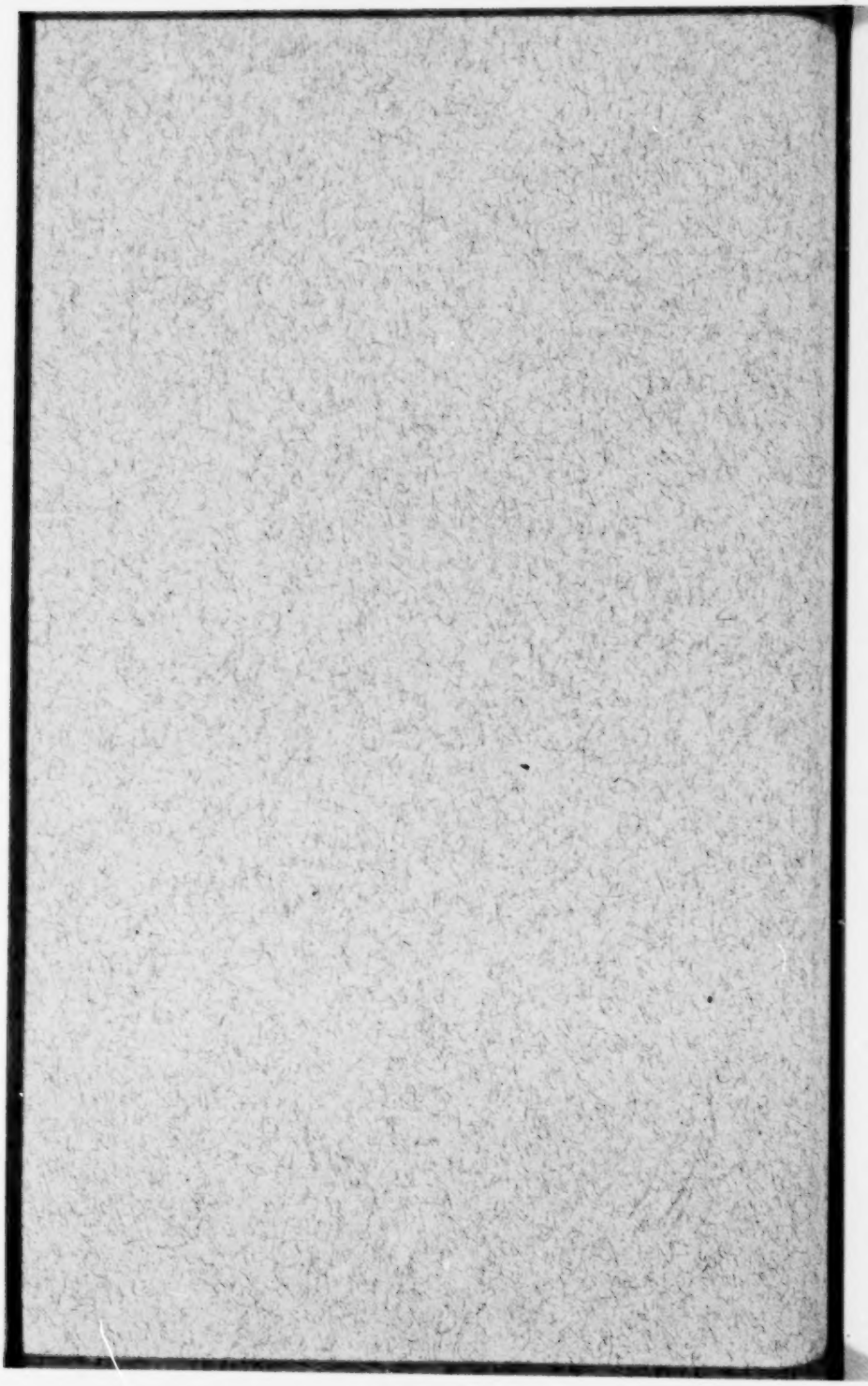
vs.

CHARLOTTE E. LEET, Administratrix of the Estate of Alfred Martin Thatcher, Deceased

---

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

E. E. Bennett,
Edward C. Renwick,
Malcolm Davis,
Counsel for Petitioner.
Thomas W. Bockes,
Of Counsel for Petitioner.



INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

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No. 1175

UNION PACIFIC RAILROAD COMPANY,
A CORPORATION,

vs.

Petitioner,

CHARLOTTE E. LEET, ADMINISTRATRIX OF THE ESTATE OF ALFRED MARTIN THATCHER, DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Union Pacific Railroad Company, a corporation, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the Supreme Court of the State of California in the above entitled cause.

Petitioner respectfully shows:

A. Jurisdiction

(a) The statutory provision sustaining the jurisdiction of this Court in this cause is Section 237(b) of the Judicial

Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937, United States Code, Title 28, Section 344(b), the federal question involved being the interpretation of the venue provision of the Federal Employers' Liability Act, 45 U. S. Code, Sec. 56.

(b) The date of entry of the judgment of the Supreme Court of California here sought to be reviewed is January 25, 1945. Said judgment is the final judgment of that Court, which is the highest court in the State of California in which a decision of said matter could be had. This petition for writ of certiorari, supporting brief, and the record in said cause are being filed in this court within three months after the entry of said final judgment.

B. Statutes Involved

This case arises under the Federal Employers' Liability Act (United States Code, Title 45, Sections 51-59).

C. Question Presented

The question presented is whether the Supreme Court of California erred in deciding that the courts of that state have been deprived by the venue provisions of the Federal Employers' Liability Act of all power to decline jurisdiction of a case brought under the Federal Employers' Liability Act by a resident of Oregon against a Utah railroad corporation doing business in California, where the accident involved occurred in Oregon, decedent and his heirs resided in Oregon, all the witnesses resided in Oregon, and none of the witnesses could be brought to testify personally at the trial in California without serious interference with interstate commerce.

D. Summary Statement of the Matter Involved

Alfred M. Thatcher, while employed as a brakeman on one of petitioner's freight trains was killed in an accident

which occurred near Portland in Multnomah County, Oregon, on February 7, 1942. All witnesses to the accident, which involved two trains, resided in or near Portland. Mr. Thatcher and his widow, for whose benefit the action was instituted, also resided in Portland.

Union Pacific Railroad Company, petitioner, is a corporation of the State of Utah. At the time of the accident and at the present time petitioner carried on its business as a carrier of freight and passengers for hire in the States of Oregon, California, Utah and other states.

At all pertinent times there were open and functioning within the State of Oregon regularly constituted courts, both state and federal, of original and general jurisdiction, which were conveniently available for the prompt and effective enforcement of any meritorious claim against petitioner arising out of said accident. The above action was instituted April 27, 1942, in the Superior Court of the State of California in and for the County of Los Angeles. In due course petitioner filed its motion to abate the said proceedings on the ground that it could not properly defend itself in the California damage action without withdrawing from railroad service for a week or more a large number of its employees who could not be replaced by others because of labor shortages; that by direction of the government petitioner was engaged in transporting large numbers of troops and vast quantities of vital war material, the prompt movement of which was essential to the prosecution of the war; that to handle such emergency war traffic and other traffic, petitioner was compelled to work all of its train service employees, most of them overtime, and some of them on double shifts; that the withdrawal of one or more train crews from active service for use as witnesses in the California case would interrupt the physical operation of some of petitioner's trains; and that in these circumstances the prosecution of the case in California

would require petitioner either to violate its paramount obligation to the government and the public in the transportation of interstate commerce or to waive its constitutional right to present properly its defense in said case. The motion was supported by affidavits verifying all the pertinent facts. No counter-affidavits were filed.

The motion was denied on the ground that the court had no power to refuse jurisdiction in view of what the trial court felt to be the interpretation of the venue provision of the Federal Employers' Liability Act in the case of *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698.

A subsequent motion for the continuance of the trial until such time as witnesses could be brought from Oregon to Los Angeles without interfering with the transportation of interstate commerce was also denied, on the grcund that since the court was bound to entertain jurisdiction of the case, it was likewise bound to try it expeditiously.

The case thereupon went to trial and evidence was introduced on the part of respondent, both by the personal testimony of witnesses and by deposition. The defendant called no witnesses, merely presenting evidence that no witnesses could be produced in person for the reasons above set forth. The jury brought in a verdict for respondent in the amount of $15,000.00.

Petitioner appealed to the District Court of Appeal of California. That court affirmed the judgment of the Superior Court.

Respondent then petitioned for a hearing of the cause by the Supreme Court of California. This was granted, thereby vacating the proceedings before the District Court of Appeal, and in due time the said Supreme Court in a four-to-three decision affirmed the judgment below, holding that the Superior Court was without power to abate the proceedings or to continue the same indefinitely, no matter what equitable considerations might exist therefor.

The Court regarded the venue provision of the Federal Employers' Liability Act as constituting a mandate by Congress that any state court having competent general jurisdiction appropriate to the purpose must entertain actions brought under the Federal Act, in spite of the existence of reasons which otherwise would require abatement of the proceedings.

Petitioner then petitioned for a rehearing, but although three of the Justices voted for it, rehearing was denied on January 25, 1945.

On proper application the Supreme Court of California entered an order staying the issuance of remittitur until further order of that court.

E. Reasons Relied On for Issuance of Writ

Petitioner submits that this Court should review the said decision of the Supreme Court of the State of California for the following reason:

The California Court decided a federal question in a way probably not in accord with applicable decisions of this Court. It held that the venue provision of the Federal Employers' Liability Act is an absolute command by Congress that a state court must entertain jurisdiction of an action brought under the Act, if the carrier is doing business within that state, in spite of the existence of facts and circumstances which otherwise would require the abatement of the proceedings. That decision is probably not in accord with the decisions of this Court in such cases as *Michigan Central R. Co.* v. *Mix,* 278 U. S. 492, 73 L. ed. 470; *Douglas* v. *N. Y., N. H. & H. R. Co.,* 279 U. S. 377, 73 L. ed. 747; *Miles* v. *Ill. Central R. Co.,* 315 U. S. 698 (dissenting opinion and concurring opinion of Mr. Justice Jackson); 86 L. ed. 1129; *Herb* v. *Pitcairn,* decided Feb. 5, 1945, L. ed. Adv. Op., Vol. 89, p. 481.

Prayer

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court, directed to the Supreme Court of the State of California, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and proceedings in the case entitled on its docket, "Charlotte E. Leet, Administratrix of the Estate of Alfred Martin Thatcher, Deceased, Plaintiff and Respondent, vs. Union Pacific Railroad Company, a corporation, Defendant and Appellant, Los Angeles No. 18,953," and that the court review and decide the said questions presented and reverse the judgment of the Supreme Court of the State of California entered in said cause, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, at Los Angeles, California, March 29, 1945.

UNION PACIFIC RAILROAD COMPANY,
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EDWARD C. RENWICK,
MALCOLM DAVIS,
Counsel for Petitioner;
THOMAS W. BOCKES,
Of Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No 1175

UNION PACIFIC RAILROAD COMPANY,
A CORPORATION,

Petitioner,

vs.

CHARLOTTE E. LEET, ADMINISTRATRIX OF THE ESTATE OF ALFRED MARTIN THATCHER, DECEASED

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Report of Opinion Below

The opinion of the Supreme Court of California is not yet officially reported, but appears in the advance sheets of Vol. 155, Pacific Reporter, Second Series, at page 42.

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1935, Chapter 229, Section 1; 43 Stat. 937, U. S. Code, Title 28, Section 344(b). This section is deemed to apply because the question for decision is the interpreta-

tion of the venue provisions of the Federal Employers' Liability Act, U. S. Code, Title 45, Sections 51-59.

Statement of the Case

The pertinent facts are stated in the foregoing petition (pages 2-5).

Specification of Errors

The Supreme Court of California erred in deciding that the courts of that state have been deprived by the venue provisions of the Federal Employers' Liability Act of all power to decline jurisdiction of a case brought under the Act by a resident of Oregon against a Utah railroad corporation doing business in California, where the accident involved occurred in Oregon, decedent and his heir resided in Oregon, all the witnesses resided in Oregon, and none of the witnesses could be brought to testify personally at the trial in California without serious interference with interstate commerce.

Argument

No liability arises under the Federal Employers' Liability Act in the absence of negligence on the part of the carrier, its officers, agents or employees (45 U. S. Code, Section 51). Since petitioner denied respondent's charges of negligence, it was entitled to be heard upon that issue. Its opportunity to defend must be real and not merely colorable or illusory. (*O. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 524-525).

It was admitted throughout that petitioner could not properly present its defense on the factual issues without the personal presence of approximately twenty employee witnesses and that petitioner could not use such employees as witnesses in California without taking them out of active service in Oregon for a week or more and thereby seriously retarding the movement of emergency war traffic.

Under existing man-power conditions it was not possible to replace such employees during their absence.

In spite of the existence of these uncontroverted facts, the California trial court refused to abate the proceedings, regarding the venue provision of the Federal Employers' Liability Act as an absolute mandate that the courts of any state in which the carrier is doing business must entertain an action brought under the Act and must proceed to trial thereof.

This decision of the trial court was made in spite of the settled policy of California not to require a party to proceed to trial of a case at a place where the testimony of his witnesses can be presented only by deposition.

First Trust Joint S. L. Bank v. *Meredith*, 16 Cal. App. (2d) 504, 508; 60 Pac. (2d) 1023.

Bartholomae Corp. v. *Ass'd. Co.*, 203 Cal. 176, 179; 263 Pac. 516.

Carr v. *Stern*, 17 Cal. App. 397, 408; 120 Pac. 35.

Thompson v. *Brandt*, 98 Cal. 155, 156; 32 Pac. 890.

For that reason the trial court undoubtedly would have granted the motion to abate if the action had been a transitory one not governed by the provisions of the Federal Employers' Liability Act, even if the action had been brought for the benefit of a California citizen. It was solely because of its interpretation of the venue provisions of that Act that the motion was denied.

In affirming the order of the trial court the Supreme Court of California adopted a like view. The majority opinion is replete with expressions to the effect that the venue provision of the Federal Employers' Liability Act is a Congressional command which can not be thwarted by the abatement of proceedings brought under the Act for any reason whatsoever.

It is submitted that these views of the California Trial and Supreme courts are at variance with the decisions of this court. Thus, in *Mich. Central R. Co.* v. *Mix*, 278, 492, action had been brought under the Federal Employers' Liability Act in a Missouri state court on a cause of action arising in Michigan. The Railroad Company had no line of railroad in Missouri, but did maintain in that state an agent upon whom process was validly served. This court held that the action should not have been entertained by the Missouri court, because of the resulting burden upon interstate commerce. In *Douglas* v. *N. Y., N. H. & H. R. Co.*, 279 U. S. 377, this court held that the courts of New York are under no obligation to take jurisdiction of an action brought under the Federal Employers' Liability Act involving an accident which occurred in the state of Connecticut. In that case the carrier operated a line of railroad in the state of New York. In the recent cases of *Herb* v. *Pitcairn*, and *Belcher* v. *Louisville & Nashville R. R. Co.*, decided February 5, 1945, 89 Law ed., Adv. Op. 481, this court has again held that the Federal Employers' Liability Act does not purport to require state courts to entertain suits arising under it and that there is nothing in the Act that purports to force a duty upon state courts to entertain jurisdiction as against an otherwise valid excuse.

The majority opinion of the Supreme Court of California was based primarily upon certain language contained in the majority opinion of this court in the case of *Miles* v. *Ill. Central R. Co.*, 315 U. S. 698. Reliance is placed on the statement in the majority opinion written by Mr. Justice Reed that "the Missouri court here involved must permit this litigation". In the dissenting opinion of Mr. Justice Frankfurter, which was concurred in by the Chief Jus-

tice, Mr. Justice Roberts and Mr. Justice Byrnes, it is demonstrated that a mere grant of jurisdiction contained in a venue provision of a congressional act such as that contained in the Federal Employers' Liability Act is not compulsive as against reasons which otherwise would convince the state court that it should not take jurisdiction of a case under the particular circumstances existing therein. In the concurring opinion of Mr. Justice Jackson the reasons were set forth which led him to agree with the reasoning of Mr. Justice Reed insofar as the actual question involved in the *Miles* case was concerned, namely, the propriety of a state court's enjoining its own citizen from prosecuting an action under the Federal Employers' Liability Act in a distant state court when the reasons for such action were only those of "normal expense and inconvenience of trial in permitted places". However, Mr. Justice Jackson made it clear that he did not agree with the statement in the majority opinion that the Missouri court must permit the litigation. Therefore, the true effect of the decision in the *Miles* case was the very opposite of that for which it is cited by the Supreme Court of California.

It must be evident that the Supreme Court of California has misconstrued the meaning and effect of the *Miles* case. There is a large volume of litigation arising under the Federal Employers' Liability Act, and the practice of conducting it in forums distant from the occurrences involved cannot but result in a serious burden upon interstate commerce. Some control is imperative in the public interest. This can be provided if the State courts are allowed to refuse jurisdiction of a case that in the interest of justice should be tried elsewhere. *Canada Malting Co.* v. *Paterson Co.*, 285 U. S. 413, 76 L. ed. 837. Mistakenly, the California Court has held itself to be deprived of this right.

The question is an important one from many standpoints, and it is earnestly contended that this court should resolve it.

Respectfully submitted,

E. E. Bennett,
Edward C. Renwick,
Malcolm Davis,
Counsel for Petitioner;
Thomas W. Bockes,
Of Counsel for Petitioner.

(7527)

In the Supreme Court

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United States

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No. 1175

UNION PACIFIC RAILROAD COMPANY
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CHARLOTTE B. LEET, Administratrix of the Estate of Alfred Martin Thatcher, Deceased,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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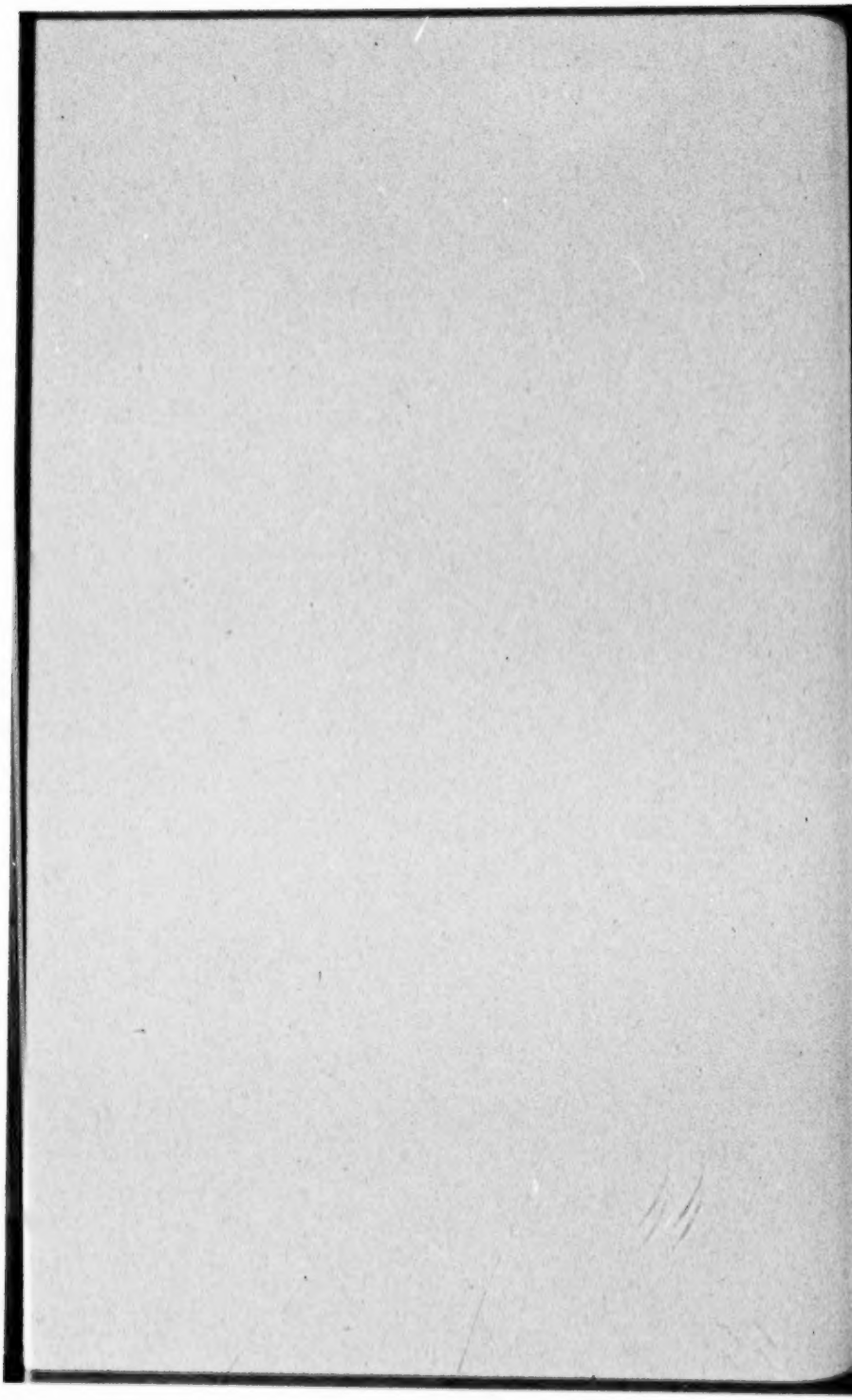

Subject Index

Table of Authorities Cited

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of California is not yet officially reported. It appears in the Advance Sheets of the California Reports at 25 Advance California Reports, 764 and appears in the Advance Sheets of Volume 155 Pacific Reporter, Second Series, page 42. It also appears in the record at page 68.

JURISDICTION.

The opinion of the Supreme Court of the State of California was rendered December 30, 1944. A petition for a rehearing was denied by the Supreme Court of California January 25, 1945. Petition for writ of certiorari was filed on April 18, 1945 and served on respondent on April 25, 1945. Jurisdiction, if present, must come from Section 237b of the Judicial Code as amended by the Act of February 13, 1925 but is not present because of the absence of any substantial federal question.

ARGUMENT.

GROUNDS FOR CERTIORARI ARE NOT PRESENT.

Thatcher, a brakeman employed by petitioner, was killed in a collision which occurred near Portland, Oregon on February 7, 1942. Respondent, after ap-

pointment as administratrix of the estate of Thatcher (see *Estate of Waits,* 146 Pac. (2d) 5, 23 A.C. 693), instituted an action in the Superior Court of the State of California in and for the County of Los Angeles to recover damages for the death of Thatcher under the Federal Employers' Liability Act (45 U.S.C.A. 51) on April 27, 1942. Answer was filed by respondent May 28, 1942 (R. 3) and the case was then at issue and ready for trial. Four months later on September 26, 1942 (R. 14) petitioner filed a complaint in equity in the Circuit Court of the State of Oregon against Lila B. Thatcher, Thatcher's widow, in an attempt to enjoin the California proceeding. The action of the Oregon lower Court in granting such an injunction was reversed by the Supreme Court of Oregon (146 Pac. 2d 76—opinion on denial of rehearing 769). Petitioner herein filed a petition before this Court for certiorari in the Oregon proceeding (October Term, 1943, No. 1028) and the petition for writ of certiorari was denied by this Court on the 9th day of October, 1944. (89 L. Ed. Adv. Op. No. 1, p. 35.) Although the California proceeding was at issue and ready for trial upon the filing of petitioner's answer on May 28, 1942, on November 14, 1942 petitioner filed in the California proceeding a notice of motion to abate proceeding. (R 13.) The motion was based on the affidavit of Malcolm Davis, to which was attached a copy of the complaint in the Oregon proceeding. This complaint alleged, as claimed grounds for injunctive relief, hardship upon the petitioner and interference with the war effort in that proper presentation of a defense in California would require petitioner to transport a number of its Oregon em-

ployees to California. The complaint does not claim that the evidence of petitioner's witnesses could not be presented in deposition form under the laws of the State of California but claims only that "usually such explanations cannot be made adequately or understandably by witnesses testifying by deposition only." (R. 19.) Petitioner's motion to abate was denied November 20, 1942. On December 7, 1942 petitioner filed a notice of motion to continue trial. (R. 40.) The case had been set for December 11, 1942 for trial and on the hearing of the motion was continued for trial from December 11, 1942 to December 21, 1942. (R. 64.) On December 14, 1942 petitioner filed an amended answer. On December 21, 1942 at the opening of the trial, petitioner renewed its motion for an indefinite continuance and the motion was denied. (R. 64.) The trial resulted in a verdict and judgment in favor of respondent in the amount of $15,000.00.

It is conceded that the California Courts assume jurisdiction of a tort action in which the accident occurred and the parties reside in other states.

Loranger v. Nadeau, 215 Cal. 362;
Rubin v. Schupp, 127 Fed. 2d 625, C.C.A. 9.

The cases cited by petitioner on page 9 of its brief concern themselves with motions for change of venue from the California Superior Court of one County to the Superior Court in another County on the ground of convenience of witnesses under California Code of Civil Procedure 397, subdivision 3. They have nothing to do with the issue at bar. Therefore, under California law if the cause of action here in question arose under Oregon state law rather than under the

Federal Employers' Liability Act, the California Superior Court would have assumed jurisdiction. It is conceded that the Superior Court is a Court of general jurisdiction adequate to entertain actions under the Federal Employers' Liability Act, and that no question of State Court venue is here involved.

The Supreme Court of the State of California held "The Court (the trial Court) denied defendant's motions without opinion and it must be assumed that the denial was on the merits." (R. 69.) The dissenting opinion starts out with the following statement: "I cannot agree with the assumption made by Mr. Justice Carter that the motions of the railroad company to continue the trial of the two actions were denied upon the merits." (R. 84.) The opinion of the Court therefore, determined that petitioner's motions were denied *on the merits.*

There is nothing in the Federal Employers' Liability Act which compels the California Court to abate a proceeding under the Federal Employers' Liability Act because the accident occurred and the parties reside in another state. It is conceded that petitioner does business in California and that its lines of railroad run through California, and California's jurisdiction is therefore sufficient under *Denver & Rio Grande W. R.R. Co. v. Terte,* 284 U.S. 284.

This Court has held that a cause of action must not be discriminated against because it is a Federal one. In the absence of an otherwise valid excuse a State Court of competent jurisdiction must entertain an action under the Federal Employers' Liability Act.

McKnett v. St. Louis & S.F. R. Co., 292 U.S. 230.

This rule was restated in the case of *Herb v. Pitcairn*, February 5, 1945, 89 L. Ed. Adv. Op., page 481 at page 485. Since the California Court will entertain jurisdiction of a foreign state tort, there is no reason for it to refuse jurisdiction of a foreign Federal tort. Since the California Supreme Court has held that the motions of petitioner were denied on the merits, there is no Federal question here presented.

It was not incumbent upon the California Courts to grant petitioner's motions merely because petitioner claimed an interference with the war effort. During Federal control of railroads in the last World War, the Director General of such railroads as were under Federal control, ordered that all suits against carriers while under Federal control must be brought in the County or District where the plaintiff resided at the time of the accrual of the cause of action or in the County or District where the cause of action arose. (See *Alabama & Vicksburg R. Co. v. Journey*, 257 U.S. 111.) No such order has been made during this war and the Union Pacific was not and is not now under Federal control. The California Supreme Court has held that the exigencies of the war effort absent any legislative or executive fiat do not require it to abate the further prosecution of litigation based upon the Federal Employers' Liability Act where it is conceded that petitioner does business and operates a portion of its railroad system in California. No reason appears why the decision of this Court in *Miles v. Illinois Central Ry. Co.*, 315 U.S. 698 following *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 and the *McKnett* case should not be followed.

The Federal Employers' Liability Act, as a "law of the United States" made in pursuance of the Constitution is the "supreme law of the land" (Constitution, Article VI), i.e., it is a part of the substantive law of each state of the Union of States. In enforcing the law in a State Court, it is State judicial power, not Federal judicial power, that is exerted. There is a clear distinction between the opening and the closing of State Courts to plaintiffs seeking enforcement of a federal substantive right. If California had closed her Courts to such a plaintiff for the duration of the war there would be a question for the Federal Supreme Court, but at bar the California Courts have in substance simply ruled that the State Courts will be kept open for the enforcement of the substantive law of the land made by the Congress in pursuance of the Constitution.

No Federal right, substantial or otherwise, was denied to petitioner. No question of substance not therefore determined by this Court was involved and the decision of the California Court is strictly in accord with applicable decisions of this Court. It is respectfully submitted that the petition for certiorari is entirely devoid of merit and should be denied.

Dated, San Francisco, California,
May 14, 1945.

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